Statement of Sally Katzen

before the
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
of the
House Judiciary Committee
on

"The Office of Information and Regulatory Affairs: Federal Regulations and Regulatory Reform"

September 30, 2013

Chairman Bachus, Ranking Member Cohen, Members of the Subcommittee. Thank you for inviting me to testify today about the Office of Information and Regulatory Affairs ("OIRA"). The Subcommittee's last oversight hearing on OIRA was in March 2012. Since then, there has been an election, and President Obama has nominated (and the Senate has confirmed) new leadership both for OIRA and the Office of Management and Budget (OMB). I believe both OIRA and OMB are in exceedingly capable hands, and the work that has been done in the last few months suggests that it is on the right path to effectively perform its responsibilities.

As you know, I served as the Administrator of OIRA for the first five years of the Clinton Administration, then as the Deputy Assistant to the President for Economic Policy and Deputy Director of the National Economic Council, and then as the Deputy Director for Management of OMB. After leaving the government in January 2001, I taught administrative law courses at the University of Pennsylvania Law School, University of Michigan Law School, George Mason University Law School, and George Washington University Law School, and also taught American Government courses to undergraduates at Smith College, Johns Hopkins University, and the University of Michigan in Washington Program. For the last few years, I have been at the NYU School of Law teaching a seminar in advanced administrative law and a first-year course, Legislation and the Regulatory State; this fall I am also serving as the co-Director of NYU Law School's Washington DC Clinic for third-year law students. I am also a Senior Advisor at the Podesta Group here in Washington. Before entering government service in 1993, I was a partner at Wilmer, Cutler & Pickering, specializing in regulatory and legislative issues, and, among other professional activities, I served as the Chair of the American Bar Association Section on Administrative Law and Regulatory Practice (1988-89). During my government service, I was the Vice Chair (and Acting Chair) of the Administrative Conference of the United States (ACUS). Since leaving the

government in 2001, I have written articles for scholarly publications and have frequently been asked to speak on administrative law in general and rulemaking in particular.

Since the last oversight hearing, regulations have not gotten a whole lot of favorable press. We are told repeatedly that there has been an unprecedented surge in regulations during the Obama Administration and that the resulting burden (and the likelihood of more regulations in the next few years) is a drain on the economy, the reason why job growth has not been as strong as expected, and the reason why American industry is at a competitive disadvantage in the global market, to name just a few of the assertions by the critics.

In fact, with respect to the number of regulations, there have been *fewer* (rather than more) final rules, and fewer significant final rules (those reviewed by OIRA), published in 2012 and 2013 (to date) than during any year of the George W. Bush Administration (or any year of the Clinton Administration). In addition, it bears emphasis that the 111th Congress enacted several major pieces of legislation, including the Affordable Care Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act, which include delegations of authority to federal agencies for hundreds of regulations to implement these laws. That is what the Constitution charges the Executive to do: "take care that the laws be faithfully executed." (Art. II, Sec. 3) There may be some in the current Congress who want to repeal these laws, but their efforts to that end have so far been unsuccessful, and as long as the laws are on the books, the agencies are responsible for issuing implementing regulations giving effect to the legislative mandates.

With respect to the total cost of all regulations, the basis for the oft-quoted quantification has been fiercely disputed and discredited, and the sponsoring agency has recently clarified that the underlying study "cannot appropriately be used to inform discussion about any regulatory costs that have or have not been incurred since 2008." http://www.sba.gov/advoacy/7540/49291. Similarly, there are precious few facts to support the various allegations regarding the adverse effect of recent regulations on the economy. An April 8, 2013, paper entitled "What are Regulation's Effects on Employment?" from the University of Pennsylvania Program on Regulation observed: "researchers and agency analysts have made remarkably few attempts to evaluate systematically the broader employment effects of regulations after they have been adopted and implemented." It did look at several recent studies, which essentially found "no substantive or statistically significant effects of local air pollution regulations on employment" (emphasis added). https://www.law.upenn.edu/blogs/reblog/2013/04/08-coglianese-regulation-and-employment.html. An April 3. 2012, report from NYU's Institute for Policy Integrity made essentially the same point: "The current debate on jobs and environmental regulation too often relies on thinly-supported forecasts about

jobs "killed" or "created" by public protections."
http://policyintegrity.org/publications/detail/regulatory-red-herring

Moreover, while we hear a lot about the costs of regulation, we rarely hear about the benefits of regulation – for example, improving our health or the air we breathe or the water we drink; protecting our safety in our homes, our automobiles, or our workplaces; or increasing the efficiency of our markets. Those who embrace cost/benefit analysis should speak to the benefits as well as the costs of regulation. Here, there are data -- incomplete as they may be – which clearly show that the benefits of rules issued during the Obama Administration have been substantially greater than the costs of those rules. For example, the 2012 Report to Congress on the Benefits and Costs of Federal Regulations showed that for FY2011 (the most recent fiscal year for which data are available), the rules "were estimated to result in a total of $34.3 billion to $89.5 billion in annual benefits and $5.0 billion to $10.1 billion in annual costs." www.whitehouse.gov/sites/default/files/omb/inforeg/2012_cb/2012_cost_benefit_report.pdf at 24. Therefore, even taking the lowest estimate of benefits ($34.3 billion) and the highest estimates of cost ($10.1 billion), the rules issued in 2011 produced at least $24.2 billion in net benefits

In my testimony for the last oversight hearing, I mentioned in passing the subject of the adequacy of OIRA resources. While it is fashionable to argue that government agencies should do more with less, there comes a point when that is simply not possible. We are now at that point. When OIRA was created and President Reagan signed EO 12291 (the predecessor of EO 12866 which today governs regulatory review), there were about 90 FTEs (full-time equivalent employees) at OIRA; during my tenure, the number was between 60 and 50. The current number is hovering around 40. Yet during this period, Congress has assigned new tasks to OMB, including requiring various reports to Congress and imposing specific on-going responsibilities under the Unfunded Mandates Reform Act of 1995, the Small Business Regulatory Enforcement Act of 1996, the Data Quality Act of 2001, the Regulatory Right-To-Know Act of 2001, the Small Business Paperwork Relief Act of 2002, and the E-Government Act of 2002. And all of this is without regard to the extended furloughs of all of the OIRA staff during the past summer as a result of the effect of the sequestration on an agency whose primary costs are for its personnel, and add to that the fact that this hearing is taking place on the last day of this fiscal year, and tomorrow the staff of OIRA could possibly be told to stay home and not do any work; even if a government shutdown is averted after this statement is submitted to the Subcommittee, the OIRA staff, like the staff of almost all government agencies, spent a great deal of time and effort last week (and possibly before that) working on contingency plans for a shutdown rather than on regulatory reviews or other routine business of the office. The business community has repeatedly argued with great force

and logic that certainty is critical to its planning and operations; the same principle, I submit, applies with equal force and logic to government operations.

I am not oblivious to the widespread appeal for smaller government as an abstract concept. But it would, in my opinion, be penny-wise and pound foolish to apply that concept indiscriminately across all programs and agencies. The President's Council on Jobs and Competitiveness, which was created to provide non-partisan advice to the President on strengthening the Nation's economy and enhancing our competitiveness in global markets, stated in its final report: "Thorough review by OIRA improves the quality of regulatory analysis and decisions . . . . Even modest improvements in regulations can yield billons of dollars in benefits to the public." http://files.jobs-council.com/files/2011/10/JobsCouncil_Regulatory.pdf. The Council recommended that OIRA's staff be increased. There are other voices calling for an increase. See http://www.rollcall.com/news/more_resources_for_regulatory_review_would_benefit_consumers_commentary-227408-1.html. Having had the privilege of serving as Administrator of OIRA, I am convinced that the staff of OIRA is one of the best investments we can make to continue progress in the regulatory arena.

Another topic I raised in the last oversight hearing that relates to the orientation of OIRA, which traditionally has focused virtually all of its time and resources on the review of individual regulatory actions developed by the agencies – one at a time (except where two or three arrive in close proximity to one another). While this review is critical in providing a dispassionate and analytical "second opinion" on an agency's significant regulatory actions and in ensuring that each new significant regulatory action is consistent with the President's policies and priorities (as well as coordinating regulatory policy within the Executive Branch through the inter-agency process over which it presides), it would be an important step forward if OIRA could do more than one-by-one reviews. The issues plaguing our country are not likely to be solved by a single regulatory action, nor do they always fit neatly in one agency. Whether it be clean air, worker safety, food purity, energy efficiency, or a host of other issues of concern, it is often valuable to look beyond the specific proposal presented and consider the broader picture – in effect, construct a framework for addressing the problem, allocating resources, and ensuring a coherent and comprehensive regulatory solution.

The mechanism for embarking on and developing such an approach is already in place – Section 4 of Executive Order 12866, "Planning Mechanism." Under sub-section (c), "The Regulatory Plan," both Executive Branch agencies *and* IRCs must send to OIRA (for OIRA review and circulation to other interested agencies) a document that includes a statement of the agency's regulatory objectives and priorities as well as a summary of "the most important significant regulatory actions that the agency expects to issue in proposed or final form in that fiscal year or thereafter." These materials are

published in the semi-annual *Unified Regulatory Agenda*. I know that the *Agen*da has not always been published on time (in this and previous Administrations), and that last year one of the semi-annual *Agendas* was not published. Some have implied that the lapse last year was the result of nefarious political manipulations at work, but my understanding is that the delay was occasioned by an altogether legitimate (and much needed) effort to make the *Agenda* a more useful tool for all concerned.

The *Agenda* is the one systematic government-wide report of contemplated (and completed) regulatory actions. As such, it is used both by those inside the government and by stakeholders potentially affected by the regulations– be they regulated entities or regulatory beneficiaries -- to monitor what is happening at the various regulatory agencies. But the document is only as valuable as the information is accurate. Regrettably, over the years, a number of regulatory proposals were included in the *Agenda* because someone at an agency thought it was possible that action on that proposal might occur within a few years; then, once entered into the *Agenda*, the entry takes on a life of its own even if there is virtually no likelihood of any activity on the proposal in the foreseeable future. The information then becomes misinformation or obscures what is truly relevant. While it should be easy to "clean up" the Agenda, it apparently is appreciably more difficult and time consuming than anyone thought.

For this and other reasons, the process of submitting entries to the *Agenda* has become more of a paper exercise than an analytical tool. Again, this is not new; before, during and after my tenure at OIRA, the focus was on the transactions, rather than broadening the inquiry and better coordinating the regulatory activity of the agencies. But it does not have to be that way. Professor Peter Strauss of Columbia law School and others have called for OIRA to put meat on the bones of this planning process. I concur, so long as OIRA is given the support and resources to do so.

Thank you again for inviting me to participate in this hearing, and I look forward to answering any questions you may have.